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No. 1023 (October Term, 1940)

In the

Supreme Court of the United States

OCTOBER TERM, 1941

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT

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Petitioner,

vs.

THE UNION TERMINAL COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This suit was instituted by Petitioner on behalf of a group of Respondent's employees commonly known as red caps. The suit was based on Section 16(b) of the Fair Labor Standards Act of 1938 (hereinafter referred to as the Act) and sought recovery of $38,626.99 covering alleged unpaid wages, together with an additional $38,626.99 as liquidated damages.

Substantially all of the essential facts were agreed upon, the case being submitted largely upon a stipulation entered into by the parties.

For many years prior to the passage of the Act, Respondent had red caps on its premises to handle baggage and otherwise to assist passengers and other persons using the premises owned by Respondent. The red caps received payment in the form of so-called "tips".* They were permitted by Respondent to retain these tips and were not required to account for them.

The Fair Labor Standards Act became effective on October 24, 1938. Section 6 of the Act required the payment to employees of certain minimum wages. On October 22, 1938 Respondent delivered to each of the red caps then employed by it (including all red caps represented in this suit) a notice in the following form:

"Dallas, Texas, October 22, 1938.

"To: Red Caps,
The Union Terminal Company.

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amount received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remunera-

* The word "tips" is used throughout this brief as a convenient term to designate the sums of money received by red caps from passengers for services rendered in handling hand baggage.

tion received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

THE UNION TERMINAL COMPANY,

By Murrell L. Buckner,
Vice-President and General Manager."

(Transcript of Record, p. 127.)

Under date of October 24, 1938, A. J. Pickett, representing the union to which the red caps belong, wrote the following letter to Respondent:

"October 24, 1938.

"Mr. Murrell L. Buckner,
Vice-President and General Manager,
The Union Terminal Company,
Dallas, Texas.

"Dear Sir:

"I have a copy of a circular issued by your company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed; i.e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he received in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by per-

sons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

"FAIR LABOR STANDARDS ACT:

"Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each of his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the administrator, we are accordingly filing this notice of protest, for the reasons set forth herein.

Yours truly,

(Signed) A. J. PICKETT,
General Chairman."

(Transcript of Record, p. 128.)

On October 24, 1938 and thereafter the red caps who had been served with the notice of October 22nd continued to engage in the work of handling hand baggage as employees of Respondent upon Respondent's premises. They

reported to Respondent the tips received from passengers as required under the notice of October 22nd; and in keeping with the terms of such notice they retained such tips and were credited therefor under the guarantee arrangement set forth in the notice. In every instance when the tips did not equal or exceed the minimum wage, the red caps received a check from Respondent covering any difference.

The parties stipulated that during each work period covered by this suit the red caps received sums equal to or greater than the minimum wage, and a total sum greater than the $38,626.99 sued for herein as alleged unpaid wages. Petitioner claims however that Respondent's action of October 22, 1938 was not a compliance with the Fair Labor Standards Act and that the red caps are entitled to a second $38,626.99 as wages and a third $38,626.99 as liquidated damages. The trial court entered judgment in behalf of Petitioner, which judgment was reversed by the Circuit Court, the latter holding that the red caps had been fully paid under the Act [118 F. (2d) 328].

(In the quotations appearing throughout this brief emphasis is supplied by us unless otherwise noted.)

POINT I

When payment for services performed by an employee is made in the form of tips, the employer has the legal right to control such tips and to require that they be turned over to him or be applied to discharge his obligations.

Summary of Argument in Support of Point I

Prior to October 22, 1938, red caps were permitted by Respondent to work on its premises and retain unconditionally tips received for services rendered. The Fair Labor Standards Act was to become effective on October 24, 1938. On October 22nd, Respondent notified its employees that they would be guaranteed the minimum wage under the Act, but that all payments in the form of tips received for services performed by employees who continued to work for Respondent on and after October 24th must be reported to Respondent and applied on the guaranteed minimum, and that such employees would be paid any difference between the tips reported and the minimum wage. The red caps, who thereafter continued to work for Respondent, reporting tips and receiving checks covering any difference, challenge the legality of Respondent's action of October 22nd.

The legal right of an employer to exercise ownership over tips received by employees in payment for services rendered by such employer through his employees has never been successfully questioned in any court. The situation involved is similar to the familiar one of a hotel operating a hat check room on a tip basis. No court has ever questioned the right of a hotel to employ workers in such hat check rooms and to require all tips received to be paid

over to the hotel. Whether the wage of such employee be paid out of the general funds of the hotel or out of the tips received is of no consequence in so far as the legal right of the employer to adopt such plan is concerned. An agreement on the part of an employee that the employer may thus exercise control and ownership over tips is wholly unnecessary.

The services performed by Respondent's employees were services rendered passengers by Respondent through its red cap employees. Whether the compensation for the service thus rendered by Respondent was in the form of a fixed charge or in the form of tips, such compensation belonged to Respondent in the absence of an agreement on its part permitting its employees to retain such compensation or some part thereof. There is nothing in the Fair Labor Standards Act which prohibits an employer from having and exercising the control of all income derived from the prosecution of its business, and nothing which gives an employee the right to convert to his own use funds coming into his hands in the course of his employment and paid to him for services rendered by his employer through him. Prior to October 22nd Respondent had consented to the unconditional retention by the red caps of such compensation. The notice of October 22nd withdrew this prior consent, and thereafter all tips to the extent necessary to pay the minimum wage belonged to Respondent.

Respondent could have required the manual delivery of tips to it (just as it could have required that no tips be accepted), and then out of the tips so delivered to it, could have paid to its red cap employees their wages; or it could

have required all tips to be placed in a central box or safe and wages to be drawn therefrom at the end of each week. Respondent's requirement that tips be reported and applied on payment of wages brought about the identical result. Manual delivery and re-delivery of tips would have been superfluous, and would merely have deprived the red caps of the current use of their wages.

It is stipulated in the record that through tips collected and reported plus payment of deficiencies, every red cap received amounts equal to or greater than the minimum wage. The law does not entitle them to anything more.

POINT II

When an offer of employment is made upon clearly stated terms, and an employee, knowing such terms, goes to work or continues to work thereafter, his action in so working is an acceptance of such proffered terms and he is bound thereby.

Summary of Argument under Point II

The trial court held that Respondent's notice of October 22, 1938 was an offer of employment under terms differing from those theretofore existing; that the Union representative of the red caps wrote Respondent on October 24, 1938 refusing to accept the revised terms, and that therefore no new contract of employment was made and the agreement theretofore existing continued in effect.

Respondent submits: (1) that the letter of October 24, 1938 amounted merely to an expression of opinion by the Union representative that the terms of Respondent's no-

tice of October 22nd would not be a compliance with the Fair Labor Standards Act, and such letter did not even purport to be a rejection of employment under those terms; and (2) that even if the letter of October 24th could be construed as a rejection of employment under the terms contained in the notice of October 22nd, no terms except those contained in such notice were offered the red caps and they went to work and continued to work in full compliance with such terms, and their action in working on and after October 24, 1938 was controlling and was an acceptance of the only terms of employment offered them.

In the letter of October 24th, the Union representative first summarized the notice of October 22nd, then quoted from the provisions of the Fair Labor Standards Act and concluded with the statement that he was protesting against the notice because it was not a compliance with the Act. This was purely an expression of his opinion. If his opinion was correct, he did not even need to express it, because Respondent had to comply with the Act. If his opinion was incorrect and Respondent's action was a compliance with the Act, the expression of such incorrect opinion could not affect the situation in any way.

Even if the letter of October 24th had said in simple language: "We refuse to accept the terms of employment offered in the October 22nd notice and decline to work thereunder," no other terms of employment were offered by Respondent, and on October 24th and thereafter the red caps continued to work, reported tips on forms furnished them, accepted Respondent's checks covering differences between tips reported and the minimum wage, and otherwise complied fully with Respondent's notice.

Such action on the part of the red caps is controlling regardless of what may have been written on October 24th.

Petitioner cites no case contrary to the authorities which support the position of Respondent. Instead he contends that there was no contract because Respondent in this case recognized from time to time that the courts would ultimately pass upon the question of whether or not Respondent's action complied with the Fair Labor Standards Act. The courts have passed on the question and this court will pass on the question; but contracts are not invalidated by virtue of the fact that courts have jurisdiction to pass upon and construe them.

POINT III

Nothing in the Railway Labor Act or Interstate Commerce Act operates to nullify the effectiveness of Respondent's notice of October 22, 1938.

Summary of Argument under Point III

(A) Petitioner argues that the terms of Respondent's notice of October 22, 1938 were ineffective and void due to the fact that Petitioner had written Respondent on October 11, 1938 suggesting a conference for the purpose of negotiating a working agreement. Petitioner states that after receipt of the letter of October 11, 1938, Respondent was required by the Railway Labor Act to exert reasonable effort to negotiate an agreement and that Respondent could not by its action of October 22, 1938 make a change in the red caps' wage situation.

Petitioner offered no proof of any failure on the part of Respondent to exert whatever effort is required under the Railway Labor Act to negotiate an agreement. Such few facts as are in the record reflect that the parties exchanged various communications and did reach an agreement, although neither party undertook to have a wage scale included in the contract.

Nothing in the Railway Labor Act (which provides its own remedies) prohibits a carrier from complying with other laws such as the Fair Labor Standards Act. As the latter Act became effective October 24, 1938, it was necessary that Respondent, on pain of both civil and criminal penalties, take steps to comply with the Act. Consequently Respondent's action of October 22, 1938 was not only justified but required.

Petitioner made no claim in the trial court that Respondent had violated the Railway Labor Act, and can not make such a claim for the first time on appeal.

(B) The Petitioner argues that the effect of Respondent's notice of October 22, 1938 was to make a charge against passengers; that under the Interstate Commerce Act all charges must be uniform and must be published with the Commission; that the notice of October 22nd did not comply with this requirement of the Interstate Commerce Act and was therefore void.

Questions concerning the uniformity of rates, the publication thereof, and similar questions must be submitted to the Interstate Commerce Commission before a court of law can obtain jurisdiction over them.

Petitioner argues in effect that the money with which Respondent paid red cap wages was obtained illegally because it was a charge not authorized by the Interstate Commerce Commission and that, therefore, Respondent must pay the red caps again out of other funds legally obtained. If a passenger has paid illegal charges, it is within his power to complain before the proper body; but a red cap who has been paid wages out of such monies is in no position to claim additional wages.

POINT IV

The Terms of Employment contained in Respondent's notice of October 22, 1938, were in full compliance with both purpose and language of the Fair Labor Standards Act.

Summary of Argument under Point IV

The purpose of the Fair Labor Standards Act set forth in Section 2 thereof is to maintain a "minimum standard of living necessary for the health, efficiency and general well being of workers." This purpose was fully complied with under Respondent's notice of October 22, 1938, which guaranteed to Respondent's employees the wage which Congress said would maintain the desired minimum standard of living.

Since under its notice of October 22, 1938, Respondent exercised its right of control and ownership over tips paid to red caps for services performed by Respondent, it paid wages to the red caps by permitting them to retain such tips and paying them the difference between the tips received and the minimum wage. The word "pay" is uniform-

ly defined as the act of compensating, remunerating or discharging one's obligation. Under the terms of the notice of October 22, 1938 Respondent compensated, remunerated and discharged its obligation to the red caps.

Section 3(m) of the Fair Labor Standards Act purports to deal only with a situation in which an employee is paid wages in something other than cash. The "tips" involved herein are cash payments and are, therefore, in no way affected by Section 3(m).

Unless specifically excluded by the terms of a statute, the courts have included tips in the term "wages" in construing other social legislation.

POINT V

There was no abandonment of the accounting and guarantee plan by Respondent during the period from March 1, 1939, to October 15, 1939, as claimed by Petitioner under his Point V.

Summary of Argument under Point V

Respondent did not abandon the accounting and guarantee plan between March 1, 1939 and October 15, 1939 but simply adopted new forms of reports for use in carrying out such accounting and guarantee plan. It was stipulated by the parties in the trial court that from October 24, 1938 through October 23, 1939 Respondent "stood ready to and did pay to each red cap for each work period during which the amount of tips collected by said red cap amounted to less than the number of hours worked multiplied by 25¢, an amount equal to the difference, etc." The

period March 1, 1939 to October 15, 1939 is covered by the quoted stipulation.

POINT VI

Liquidated or punitive damages are not recoverable in the absence of a showing of fraud, malice, willful violation of the law, or gross negligence; and there being no such showing herein, no recovery of liquidated damages can be had.

Summary of Argument under Point VI

The trial court erred in proceeding upon the theory that the penalties provided for under Section 16(b) of the Act are mandatory under the statute. Under the holdings of this Court, punitive damages should not be allowed in the absence of malice or fraud. No showing of malice or fraud was made in this case.

POINT I

When payment for services performed by an employee is made in the form of tips, the employer has the legal right to control such tips and to require that they be turned over to him or be applied to discharge his obligations.

Authorities in Support of Point I

Bryant v. Pullman Company, 177 N. Y. S. 488;
Corpus Juris, Volume 39, page 125;
Gross' case, 166 A. 55;
Harrison v. Kansas City Terminal Ry. Co., 36 F. Supp. 434;
Harrison v. Terminal Railroad Association of St. Louis (Unreported);
Labatt's Master and Servant, 2nd Edition, Volume 5, page 6322;
Morison v. Thompson, L. R., 9 Q. B. 480;
Pickett v. Union Terminal Co., 33 F. Supp. 244;
Polites v. Barlin, 149 S. W. 828;
Ryan v. Denver Union Terminal Co. (Unreported);
Sloat v. Rochester Taxicab Co., 163 N. Y. S. 904;
Taylor v. Pennsylvania-Reading Seashore Lines (Unreported);
Williams v. Jacksonville Terminal Co., 35 F. Supp. 267;
Williams v. Jacksonville Terminal Co., 118 F. (2d) 324;
Zappas v. Roumeliote, 137 N. W. 935.

Argument in Support of Point I

Througs its notice of October 22, 1938 (pages 2-3 herein), Respondent notified its red cap employees that under the Fair Labor Standards Act it was required to pay such

employees a minimum wage; that in order to do so it was exercising its legal right of control and ownership over tips; that it guaranteed to the red caps who thereafter wished to continue in its employ the minimum wage, but required that all tips be reported to it and be applied against such guarantee; that it would pay to its employees any difference between the tips reported and the guaranteed minimum wage; that the plan as outlined would become effective on October 24, 1938, and would apply to all red caps thereafter continuing in its employ. After October 24th, the red caps did continue in Respondent's employ, received and reported tips, and were paid the difference when the tips reported fell short of the minimum wage.

The right of Respondent to prescribe such conditions of employment and under them to assume the control and ownership of tips is challenged by this suit of Petitioner. It is Respondent's position that by this notice of October 22, 1938, Respondent directed its employees with reference to the manner of handling the income accruing from the services rendered by Respondent to its patrons, and that such direction was final, with or without an acceptance or agreement upon the part of its employees.

This suit is bottomed squarely upon the fact that the red caps are employees of Respondent. If they are not employees, then Respondent certainly does not owe them any wages. The liability sought to be imposed upon Respondent is by virtue of the fact that it is the employer and has employed these red caps to work for it. The character of the work that they do is carrying hand baggage and rendering assistance to passengers using the station of Re-

spondent. The red caps contend that they are employees and that they perform that service for and on behalf of Respondent as their employer. They therefore contend that Respondent, through them as its employees, performs such service of carrying baggage and otherwise assisting passengers. They contend that in connection with the performance of that service by Respondent, through them as its employees, persons receiving such service pay therefor sums of money commonly termed "tips." They do not contend that any other consideration is paid to Respondent or that these "tips" are paid to the red caps over and above any other charge paid to Respondent, or for any reason other than that the persons making such payment have received a service performed by Respondent.

It has long been recognized that compensation or consideration received by a servant or employee for the services performed by him in the course of his employment, belong, in the absence of an agreement to the contrary, to the master or employer and not to the servant or employee. In the early case of **Morison v. Thompson,** L. R., 9 Q. B. 480, the court, citing other English decisions to the same effect, laid down the proposition:

> "Profits acquired by the servant or agent in the course of or in connection with his service to the agency, belong to the master or principal."

Corpus Juris (Volume 39, p. 125) states the rule as follows:

> **"Earnings from Third Persons.** * * * even in the absence of a statutory provison, the earnings of an employee in the course of, or in connection with, his services belong to the master." (Citing numerous authorities.)

In **Labatt's Master and Servant**, 2nd Edition, Volume 5, in discussing the matter of the ownership of tips, the following comment is made (p. 6322):

> "The true doctrine seems to be that the right of servants to retain gratuities given by third persons must rest, in the last analysis, upon the consent of their masters, and that a claim founded upon the existence of such a right canot be supported unless that consent is established by proof of a usage known to the master or by other suitable evidence."*

It will be borne in mind that in the instant case the so-called "tips" form the **sole** consideration paid for the service performed by Respondent through its employees. In the light of the established law relative to the right of control and ownership by the master of the income from services performed by him through his servant, Respondent, through its notice of October 22, 1938, in effect said to the red caps:

(1) That as your employer, if you continue in our employ, we have the legal right to set and prescribe for the future your hours of work and rate of pay so long as your wages are not less than 25¢ an hour; and we also have the legal right to control and supervise you in the means, method and manner in which you shall do our work.

(2) That, if you work for us in the future, and we pay you to do this work for us, your efforts belong to us and the work you do or service you perform is done and performed by us; that when we perform a service through our employees we are entitled in law, equity and fair deal-

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* For the purposes of Respondent's Point I we are not concerned with personal gratuities given **over and above** a fixed charge of an employer, although this comment of Labatt's was made in connection with such **a case**.

ing to the income to be derived from such service performed by us.

(3) That the general public has recognized in the past that it is not entitled to receive red cap service without paying for it, and such payment has customarily been made by passengers in the form of "tips"; that you will continue to accept payment for the service in the form of tips, which, since we are guaranteeing you a minimum wage, will hereafter belong to us, and you will collect them for us, and when you do so they will be in our possession constructively, because they are paid for services rendered by us through you and you must account to us for them.

(4) That periodically you will owe us so much money and we will owe you so much money, and upon accounting the funds collected by you for the service performed by us will be released from our constructive possession to the unconditional ownership of the red caps and same will be released as payment of wages.

There was no necessity for an acceptance by the red caps of the foregoing directions from their employer. The employer had the right to the income from services rendered by it, and had the right to set up the mechanics for its collection and accounting. Respondent surely had the right to direct its employee red caps on October 22, 1938, that if they continued to work for Respondent they must collect and charge 10¢ per hand bag carried by them and must turn in such collection to Respondent. Similarly Respondent had the right to direct its red cap employees on October 22, 1938, that if they continued to work for Respondent they must turn in to Respondent all payments received by them in the form of tips for carrying hand-

bags. The exercise of this right by employers is widespread and has never been successfully challenged in any court. The practice of hotels in the handling of hat check business is a most familiar illustration of the exercise of such right. Surely it will not be questioned that a hotel has the right to direct its employees in charge of a hat check counter to collect 10¢ for every hat checked and to turn such collections over to the hotel, or that it likewise has the right to direct its employees in charge of a hat check counter to accept payment for the checking service in the form of tips and to turn such tips over to the hotel, in consideration for which work such hotel could at its option pay a fixed wage or a percentage of the tips collected. Such tips collected at the check rooms of large hotels undoubtedly add up to very large sums in the course of a day's business. Can it be seriously suggested that it would be illegal for a hotel to hire an employee with directions to turn in to the hotel 75% of all tips collected but to retain 25% of such tips as his wage? If the 25% is less than the minimum fixed by law, then the hotel has a further obligation, but only in that event. The service of checking hats is rendered the patrons of the hotel by the hotel itself acting through its employees, just as red cap service is rendered the patrons of Respondent by Respondent itself acting through its red cap employees. The hotel is responsible for the conduct of its employees in the performance of the service and likewise Respondent is responsible for the conduct of the red caps. In each instance the sole income of the employer from the service rendered consists of tips paid by its patrons. The direction either by the hotel or by Respondent to its employees concerning the manner in which the

income from the service rendered should be handled requires no acceptance by such employees.

Respondent had the right to prohibit tipping on its premises, if it so desired. That would have been only an extension of the power and the right which it had exercised, without question, to prohibit the red caps from actively soliciting tips or insisting upon the payment of tips. It is therefore equally true that Respondent could attach conditions to the receipt and retention of tips. That was exactly what Respondent did in this case. There is nothing in the Fair Labor Standards Act or any other law which prohibits an employer from having the ownership of and exercising the control of all income derived from the prosecution of its business. There is nothing in the Act which compels an employer to continue in force any contracts theretofore existing pertaining to the employer's property, to-wit, the income from its business. There is nothing in the Act requiring employees to continue in past employment beyond the effective date of the Act, and there is nothing in the Act requiring employers to continue any particular employees in its employment after the effective date. There is nothing in the Act which gives an employee the right to convert to himself, to the exclusion of his employer, funds coming into his hands, received by him in the course of his employment and paid to him for the services rendered by his employer through him. There being nothing in the Act prohibiting the exercise of control over tips by an employer as a condition of employment, the exercise of such control was a matter of simple common law right.

In the case of **Geo. M. Harrison v. Kansas City Terminal Ry. Co.**, 36 F. Supp. 434, Judge Merrill Otis, sitting in the District Court of the United States for the Western District of Missouri, held against the red caps who had sued the Kansas City Terminal for double wages under the Fair Labor Standards Act. Judge Otis considered what the situation would have been had the Terminal Company directed the red caps to turn all tips in to it and then paid the red caps the minimum wage, his language (dealing with what he termed "Assumption No. 2") being:

> "Defendant was under no obligation to employ red caps. In the great majority of railway stations no such service is provided. When the defendant did employ red caps it had the right to fix the conditions of their employment (except as Congress legally may have prescribed conditions). It had the right to say what duties they should perform, how they should perform them, when they should perform them. It had the right to say whether they should take or refuse tips when offered. It had the right to require them to turn over to it all tips received.* Having these several rights, clearly the defendant might have done this—and so have complied fully with the Fair Labor Standards Act—it might have paid to every red cap in cash the minimum wage required by law, reimbursing itself out of the tips turned in. If the situation thus hypothesized were that presented in this case plaintiff could not prevail."

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* At this point Judge Otis inserted the footnote: "The statement made here is not questioned but, on the contrary, is asserted by defendant and impliedly admitted by plaintiff. (The plaintiff in the Kansas City case was represented by the same attorneys as petitioner in the instant case.) Cases which may be read in this connection are **Gross' case (Me.)**, 166 A. 55; **Sloat v. Rochester Taxicab Co.**, 163 N. Y. Sup. 904; **Zappas v. Roumeliote (Iowa)**, 137 N. W. 935; **Polites v. Barlin** (Ky. App.), 149 S. W. 828; **Pickett v. Union Terminal Co.**, 33 F. Supp. 244. None of these cases, however, questions the accuracy of the statement made. On the contrary each of them either expressly affirms the same idea or impliedly recognizes its truth."

Judge Otis then considered the actual situation with which he was dealing, namely, one in which the red caps had been served by the Kansas City Terminal Railway Company with a notice identical in language with the notice of October 22, 1938, served on the Dallas red caps. With reference to the effect of the service of such notice, Judge Otis held:

> "None seriously would contend that the red caps did not understand that the defendant intended that after October 21, 1938, tips should be counted in the calculation of minimum wages to be paid as required by the Fair Labor Standards Act. None seriously would contend that the red caps did not understand that the defendant by its announcement asserted rights to and an interest in tips received. It did that when it required that such tips should be reported daily (no employer would require an employee to report gifts in which the employer had no interest). It did that when it specifically made it known that tips were to be included in compensation guaranteed. Especially did it do that when it advised the red caps that they were 'privileged to retain * * * tips.' To grant a **privilege** is to assert the right to grant it. To grant the privilege of retaining tips is to assert the right to demand that they be paid over. The privilege of retaining tips was granted but the grant was not unconditional. The red caps understood what the condition was. They understood and they accepted it. They were to retain the tips **subject 'to their being credited on such guarantee.'** On what guarantee? On the guarantee that the compensation of each red cap will not be less than the minimum wage provided by law.'
>
> "Here was an assertion by the defendant of a claim it had a right to assert, a claim to the tips received by the red caps. Here was an arrangement by which the red cap, when he received a tip, **held it in his custody for the benefit of his employer until he had given his employer credit on his wage, after which it became his separate property.**

"So it appears that there is no **essential** distinction between the hypothetical situation discussed under Assumption No. 2 and that actually presented in this case. In each the defendant asserts its claim to tips and it has the right to do that. In each when the red cap receives a tip, he knows it is the employer's property. In the hypothetical situation the red cap turns in the employer's tip to some agent of the employer to be thereafter used in paying the red cap's wages. In the actual situation, the red cap, pursuant to understanding with his employer, keeps the employer's tip in his own custody, that it may be applied to or credited on his wages. The distinctions constitute no essential difference. Just as under Assumption No. 2, so here, plaintiff is not entitled to recover." (Emphasis the court's.)

In the later case of **James E. Taylor et al. v. Pennsylvania-Reading Seashore Lines**, (April 19, 1941, unreported) Federal District Judge Kirkpatrick (United States District Court for the Eastern District of Pennsylvania) likewise held against the red caps in their suit against the railway company, saying:

"This case is exactly on all fours with the case of Harrison v. Kansas City Railway Terminal Co., 36 F. Supp. 434, recently decided in the Western District of Missouri by Judge Otis. **The reasoning of the opinion seems to me to be irrefutable**, and I place the decision of this case, upon the grounds stated by Judge Otis."

In entering judgment against the red caps, Judge Kirkpatrick made the following, among other conclusions of law:

"5. The money paid to plaintiff by defendant's passengers was compensation paid for services rendered said passengers by plaintiffs as employees of and in the course of their employment with defendant and said money belonged to defendant.

"6. In the alternative, if said money paid to plaintiffs by defendant's passengers was not compensation paid by such passengers for the service rendered by defendant to the passengers, but was a 'tip' in the popular conception of the term as a reward for promptness or courtesy, nevertheless defendant as plaintiffs' employer had the right to direct and control the disposition of this money as money received incidental to the course of the employment and the right to require plaintiffs to pay over to defendant or to require plaintiffs to retain it on account of their wages.

"7. By permitting plaintiffs to retain the money they collected from defendant's passengers and by paying them any difference between the amounts so retained and the amount of the minimum wage provided by the Act, the defendant has paid the plaintiffs the full amount of the minimum wage, and this payment fully satisfies the requirements of the Fair Labor Standards Act.

"8. Plaintiffs are entitled to recover nothing by this action."

In the case of **C. L. Williams v. Jacksonville Terminal Company**, 35 F. Supp. 267, first decided by the United States District Court for the Southern District of Florida, Judge Curtis L. Waller, passing upon the effect of a notice to the Jacksonville red caps identical to the one involved herein, pointed out that the Terminal Station belonged to the defendant company, that not everyone who wished could work on its premises carrying handbags for passengers but that the right to so work under conditions prescribed by the company could be granted or denied as the company saw fit. He said:

"It must not be overlooked that the Terminal Company had the legal right, if it had chosen, to have fixed and collected a fee for the service so rendered,

and to have received the same, but as an incentive to better service, it allowed the red cap to keep all he collected. If he collected more than the legal minimum wage, it was his good fortune—a reward for his hustling—but if he failed to collect the minimum provided by the Act the defendant paid him the difference between the amount collected and the statutory minimum. The red cap stood to win. He could not lose. The company stood only to lose. It could never win. The red cap could often receive for his services more than the minimum wage but never less. Since, therefore, the red cap was compensated by the transfer to him of a legal right of the company to charge and collect fees for these services, the legal effect or result is the same, as far as the red cap is concerned, as if the company had collected these fees and paid the red cap directly instead of indirectly."

The action of the District Court in the Jacksonville Terminal case in denying any recovery to the red caps was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, reported in 118 F. (2d) 324. With reference to the point under discussion here the Circuit Court said:

"Because what was received from passengers was not gifts but pay for services valued by the passenger, it required no consent on the part of the red cap to make the earnings belong to the employer, who was now bound to pay for the time and efforts of the red cap during work hours. The red cap's reward was to be wages. The employer became entitled to his services and what was received for them. The notice given the red cap was sufficient to make his receipts the money of the employer.

* * * * *

"The Act undoubtedly contemplates that the employee shall be paid his wages by the employer out of employer's funds. But it does not prohibit the employee being given the duty of collecting the em-

ployer's money, and the privilege of paying himself out of it, subject to accounting, provided the employer stands ready to promptly pay any balance due the employee. * * * We do not think the Act condemns ipso facto all payment of wages by accounting, or requires us to say that although the employee got all he ought to have had of his employer's money, the employer must pay again because the employee was allowed to keep what was in his possession instead of paying it to the employer and receiving it back again.

* * * * *

"When it is clearly apprehended that red cap tips are not personal gifts but compensation for service which since October 24, 1938, is rendered by the red caps for the Terminal Company for a wage which the Terminal Company is absolutely bound to pay, it becomes plain that the tip money is the money of the Terminal Company, irrespective of the consent of the red caps; and when they are paid their wages in part or in whole out of it, they are not paid with their own but with their employer's money."

The same principle was recognized and upheld in the case of **William C. Ryan v. The Denver Union Terminal Company**, decided July 17, 1941, by the U. S. District Court for the District of Colorado (unreported). Judge J. Foster Symes of that court held that red cap service was furnished passengers by the terminal company who hired the red caps, fired them and had full control over the whole service; that tips of passengers were in payment for the service thus rendered, and that the red caps, while authorized to collect the tips for the terminal company, had to account to their employer for them, and that upon such accounting the red caps were paid their wages in full and could not prevail in the suit against the terminal company. The same result was reached by the United States District Court for the Eastern District of Missouri in the case of

George M. Harrison v. Terminal Railroad Association of St. Louis, decided March 14, 1941 (unreported).

The only part of Petitioner's brief which appears to challenge the foregoing position is contained in his Point 1 which reads: "The tips received by the red caps in the absence of a contract between them and Respondent providing that the tips would be the property of Respondent were the property of the red caps." This proposition does not directly attack the right of an employer to assert and exercise control and ownership of tips received for services performed by the employer through its employees, but it does appear to proceed upon the theory that the action of the employer in thus undertaking to control tips must be agreed to by its employees in order to be effective. The view thus taken is contrary to all of the authorities cited hereinabove.

The principal cases cited by petitioner in this court, the circuit court and the trial court in support of the abstract proposition that in the absence of an agreement tips belong to employees are **Zappas v. Roumeliote,** 155 Iowa 709, 137 N. W. 935 and **Polites v. Barlin,** 149 Ky. 376, 149 S. W. 828.

In **Zappas v. Roumeliote, supra,** the minor plaintiff had worked as a bootblack under a salary contract and the wages agreed upon were paid him. During his two-year employment he turned over to his employer daily all tips. He brought action to recover back such tips and recovered. The court held:

> "We think the court was right in instructing that the plaintiff would be entitled to **any gifts** in the way of tips, **over and above the regular charge for the**

> **service performed**, given to him by patrons of the defendant's place. * * * The plaintiff **did prove** that the tips were given to him as a gratuity, and were not intended for the defendant."

It will be noted that in the **Zappas case** the employer had a regular charge for the services which he performed through the employee, which regular charge the employer had already received; and that the employee **proved** (1) that the tips were **over and above** the regular charge, and (2) that such tips were given to him as a **gratuity**, and were **not intended** for the employer. In the instant suit, the tips paid for the carrying of hand baggage constitute the sole compensation for the service performed by Respondent through its employees. Such tips were patently received in payment for such service, and were not gratuities given in addition to a regular payment for the service rendered.

In the case of **Polites v. Barlin, supra**, Barlin, the employer, operated a shoe-shining parlor and the employee, Polites, fifteen years of age, was employed to shine shoes and clean hats. He worked five years and ten months and sued to recover $575.00, the amount alleged to have been received by him in tips during this time and paid by him over to his employer, by mistake under the belief that they belonged to the employer. The trial court sustained a demurrer to his claim for the tips paid. The Court of Appeals said:

> "In the original amended petition, it was alleged in substance that it was the habit of the people who came into appellee's place of business * * * to give the particular employee who did the work a donation of money, commonly called a 'tip,' which was a personal

gift to the employee, **in addition to the price charged by appellee for the work done.**"

* * * * *

"It clearly appears, from the amended petition * * * that the money which appellant received as tips was a personal gift to him, and he, and not appellee, was entitled to receive it; that appellant through a mistake and through a misapprehension as to his right, turned the money over to appellee. If this be true, he is entitled to recover; for it is well settled in this state, that where money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which in law, honor, or good conscience was not due or payable, and which ought not to be retained by the party to whom it was paid, it may be recovered."

The court held that under the allegations, if supported by proof, plaintiff was entitled to have his case submitted to a jury, and reversed the trial court's action on the demurrer.

Thus in the **Polites case**, which turned on a demurrer, the employee pleaded that "the tips were a personal gift to him" and that they were **"in addition to the price charged** by (the employer) for the work done." On the other hand, in the instant suit, the Petitioner did not undertake to prove that the tips were personal gifts, or that they were in addition to a regular charge collected for the service. The distinction was pointed out by the United States Circuit Court of Appeals, Fifth Circuit, in the case of **Williams v. Jacksonville Terminal Company, supra:**

"It would seem that a tip may range from a pure gift out of benevolence or friendship, to a compensation for a service measured by its supposed value but not fixed by an agreement. Most often the term is applied to what is paid a servant in addition to the

regular compensation for his service, to secure better service or in recognition of it."

It is a far cry from a case wherein a tip is given an employee, not in payment for a service rendered by his employer through him, but as a gratuity over and above a fixed charge received by the employer, to a case wherein tips constitute the sole payment for services rendered by an employer who has established as a condition of the employment a requirement that the employee account to him for such tips. The cases cited and relied upon by petitioner are not contrary in any way to our position and are not out of harmony with the cases cited by us.*

In the instant suit, the red caps employed by Respondent retained tips as their own prior to October 22, 1938, because Respondent permitted them to do so. On October 22, 1938, Respondent withdrew its prior consent and prescribed that as a condition of future employment tips would be controlled and owned by it. Petitioner contends that the red caps had to consent to such change before it could be effective. To say that an employer who has permitted his employees in the past to retain tips as their own must con-

* For other cases, not needed to support the proposition advanced by us herein, but holding that tips are wages, see Sloat v. Rochester Taxicab Company, 163 N. Y. S. 904, affirmed 221 N. Y. 491; Bryant v. Pullman Company, 177 N. Y. S. 488; Gross' case (Maine), 166 A. 55. In the Sloat case the court said:

"If the employee had turned the tips over to the employer, as probably would have been his duty in the absence of an understanding to the contrary, the wages of the employee would have been $17.10 a week. If the employee receives from the employer $12.00 and retains the $5.10 in tips, he is getting through or from the employer $17.10 a week; and if the employer paid the employee $17.10 a week and the tips were turned over to the employer, the result to each would be the same. * * * The whole theory of tipping as at present understood in the usual practice, is a payment made in order to get reasonable service, and is an exaction made or permitted by the employer so that his patrons shall help him pay the wages which is fairly due from him to his employees."

tinue to permit them to so retain tips is to say that the employer by once granting such permission has thereafter permanently deprived himself of the legal right to control and dispose of the compensation or income derived from the conduct of his business. The obvious unsoundness of such contention requires no comment.

In and through the notice of October 22, 1938, Respondent exercised its right of control and ownership over tips by prescribing for their disposition. Whether or not the employees approved of such disposition, it was none the less effective. By its notice, Respondent authorized the red caps to collect tips for and on its behalf. Thereafter the tips so collected were Respondent's money constructively in its possession but in the actual possession of its agents, the red caps. Rather than go through the unnecessary mechanics of manual delivery of the company funds to the company and then manual delivery of them back to the red caps, making a round trip, the same legal effect was accomplished by permitting the red caps to retain such company funds as a payment on wages. Since such payment (plus additional checks) made to the red caps herein was admittedly equal to or greater than the minimum wage, no further recovery can be had against Respondent.

POINT II

When an offer of employment is made upon clearly stated terms, and an employee, knowing such terms, goes to work or continues to work thereafter, his action in so working is an acceptance of such proffered terms and he is bound thereby.

Authorities in Support of Point II

L. C. Balfour Co. v. Brown, 110 S. W. (2d) 104;
Erie Railroad Co. v. Tompkins, 304 U. S. 64;
Ex Parte Farb, 174 Pac. 320;
Fidelity Union Trust Co. v. Field, 311 U. S. 169;
Gloyd v. Hotel LaSalle Co., 221 Ill. App. 104;
Shuppan v. Peoria Terminal Railway Co., 30 F. (2d) 569;
6 Companies of Calif. v. Joint Highway District, 311 U. S. 180;
Stoner v. New York Life Ins. Co., 311 U. S. 464;
West v. American T. & T. Co., 311 U. S. 223.

Argument in Support of Point II

While it is unnecessary that there be an acceptance by employees of directions from an employer under the terms of which the latter exercises its right of control and ownership over the income, in the form of tips, received for service performed by such employer, nevertheless if there be such acceptance, there can be no question as to the binding effect thereof. Even District Judge Atwell, the only judge, of all those before whom these red cap claims have been presented, who permitted a recovery, did not disagree with this proposition. He held that Respondent's

notice of October 22, 1938, prescribed new terms of employment, but that the terms were subject to acceptance by the red cap employees, and that they were not accepted. He held that Petitioner's letter of October 24, 1938, (set forth on pages 3-4 hereof) was a rejection of the employer's new terms of employment, and that therefore there was no meeting of the minds and no contract. Judge Atwell announced from the bench after the close of the evidence (Tr. of R., pp. 276-7):

> "On October 22, 1938, the defendant through its general manager at Dallas, notified each of the red caps who are operating through the plaintiff here, that the defendant claimed that that act was applicable to them, and in order to comply with the provisions they should thereafter consider that the tips which they received from the public, and which had theretofore remunerated those red caps for work which they were doing for the defendant, would be used in part to pay them the minimum wage of twenty-five cents per hour. That if such tips did not amount to that much, that then and in that event, the defendant would give them a sufficient amount to equal that legal requirement.
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> "That letter was an offer of a contract of employment, and when it was received by the employee, that employee had a reasonable time in which to answer it and let it be known whether or not he would agree to that new arrangement. Then, two days after the receipt of the letter, they notified the defendant that they would not agree to it. That they recognized the law as binding upon the defendant and upon themselves, and that they expected to follow its provisions, or words to that effect.
>
> "There was, therefore, no meeting of the minds of the defendant and its employees."

Petitioner adopts this theory under his Point II, wherein he asserts that after service of the employer's notice of

October 22, 1938, "The representative filed a protest against the action of Respondent. This left the action of Respondent unagreed to. There was, as Judge Atwell found, no meeting of the minds."

The unsoundness of this position taken by Judge Atwell and adopted by Petitioner is the subject matter of this proposition. It involves the answer to two questions: (1) Does Petitioner's letter of October 24, 1938, amount to a rejection of employment under the notice of October 22, 1938; and (2) even if the letter of October 24, 1938, be construed as a rejection of an offer, can it be held to prevail in the light of the **action** of the red caps in thereafter continuing in Respondent's employ, handling baggage, reporting tips, and otherwise complying with the terms of the notice of October 22, 1938?

The first clause of Petitioner's Point II reads (p. 24 of Petitioner's brief): "The notices served by Respondent on the red caps on October 22, 1938, did not become a part of the employment contract of the red caps because they protested against the proposed arrangement." This would seem to imply a recognition by Petitioner that if the red caps had not protested, such notice would have become part of the employment contract (except for Petitioner's contention with reference to alleged violation of the Railway Labor Act and the Interstate Commerce Act, which will be dealt with in a subsequent proposition). In other words, it is not claimed that there is anything in the common law forbidding the making of a contract of employment under the terms of which it is agreed that tips shall

be the property of the employer, to be disposed of as he sees fit.* Was such a contract made herein?

Since the letter written by Petitioner, A. J. Pickett, on October 24, 1938, is the instrument upon which the decison of the trial court herein was based, it is important that its contents be examined to see just what it says (particularly so since Petitioner's brief contains no analysis of the terms of such letter, Petitioner being content merely to designate it as a "protest").

The first paragraph of the letter reads:

> "I have a copy of a circular issued by your company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed: i.e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to

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* See **Gloyd v. Hotel LaSalle Co.**, 221 Ill. App. 104, in which an employee, more than a year after his discharge, questioned the validity of his contract of employment, by the terms of which all tips received by him as a checker were turned over to the hotel company as its own. He sued for a return of his tips. The court held:

> "The contract of employment of plaintiff as a checker and the conditions thereof, including the agreement that the tips received by plaintiff should be the property of defendant, was not a contract ultra vires of the charter powers of defendant, because such contract related to the business of the hotel and the duties of plaintiff in such employment. Neither was such contract contrary to public policy. The terms of the contract were ratified three times daily, except on Sundays, and then once or twice, by plaintiff paying over to defendant the money received by him as gratuities."

Also see **Ex Parte Farb.** (Calif.) 174 Pac. 320, in which the question at issue was the constitutionality of a California law making it a penal offense for an employer to contract with his servant that the tips received by the servant belonged to the employer, and the court held that the statute was unconstitutional on the ground that it violated the constitutional right of the parties to freedom of contract. It was therein said by the court:

> "Even if we concede that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditures of one's earnings.
>
> "The statute under review is void because it is in conflict with the due process provision of the Constitution of the United States." (U. S. Supreme Court authorities cited.)

employ in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act."

There is nothing in the foregoing quoted paragraph which suggests a rejection of the terms of employment prescribed in Respondent's notice of October 22nd; it is simply the writer's summary of the contents of the notice. The letter continues:

"In other words, the carrier contemplates crediting tips and other monies paid its employees by persons other than itself to relieve itself of the obligation imposed by the following quoted section of the law:

" 'Fair Labor Standards Act:

" 'Section 6-(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:—

" '(1) during the first year from the effective date of this section, not less than 25 cents an hour.' "

This again is simply a further attempt of the writer to summarize the notice from his own viewpoint, accompanied by a quotation from the Act. It says nothing about any employee rejecting the company's terms of employment.

The next two paragraphs of the letter read:

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each of his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby."

These two paragraphs contain merely a statement of the writer's interpretation or construction of the Fair Labor Standards Act. They do not contain a rejection of the employment offered. The letter then concludes:

> "This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the administrator, we are accordingly filing this notice of protest, for the reasons set forth herein." (End of letter.)

Here appears the word "protest" which is against the **method** proposed by Respondent to comply with the law, accompanied by an expression of opinion on the writer's part that the law would not be complied with by the employer putting the terms of the notice into effect. The quoted paragraph contains nothing even implying that the employees reject the notice or reject employment, and contains **nothing in conflict with the subsequent action of the employees** in working for a year and a half under and in accordance with the employer's notice. It is simply an expression of the writer's views that the terms set out in the notice do not comply with all requirements of the Fair Labor Standards Act, and a reservation of the right to test the **validity** of the notice.

Of course the red caps are entitled to the full protection of the Act, and if the terms of the notice, as contended by Petitioner in his letter of October 24th, were not in compliance with the Act, it did not deprive the red caps of any rights they may have had under the Act; but the letter of October 24th did nothing more than express an opinion that the notice of October 22nd was not in compli-

ance with the Act, and reserved to the red caps their right to test that legal question. Certainly the letter does not purport to reject **any lawful part** of such notice.

On the other hand, even if Mr. Pickett's letter of October 24th could be construed as undertaking not only to question the lawfulness under the Act of the conditions imposed by the notice and to preserve the rights of the red caps under the Act but also as undertaking to reject the employment offered by the notice and to refuse to work thereunder, the conduct of the red caps in actually "thereafter engaging in the handling of baggage" operated as an acceptance of the terms of employment set forth in the notice, the only terms of employment offered by the company. This is true regardless of any construction that might be placed on the so-called "protest."

The contracts of employment involved herein were made and performed in Texas. The Texas law controlling upon this point,* is clearly set out in **L. C. Balfour Co. v. Brown,** 110 S. W. (2d) 104. In that case an employee, by cross action, sought to recover commissions as compensation for his services, basing his claim on his original contract of employment. The employer defended on the ground that the original contract had been changed with respect to commissions to be paid for the employee's services, by the employer's notice of a change therein given to the employee, notwithstanding a protest of the change by the employee. The trial court held that the employee could recover commissions and bonuses allowed under the terms

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* **Erie Railroad Co. v. Tompkins,** 304 U. S. 64; **West v. American T. & T. Co.,** 311 U. S. 223; **Fidelity Union Trust Co. v. Field,** 311 U. S. 169; **6 Companies of Calif. v. Joint Highway District,** 311 U. S. 180; **Stoner v. New York Life Ins. Co.,** 311 U. S. 464.

of the original contract, since he did not consent to any modification thereof. This reasoning, which is similar to that of the Petitioner in the instant case, was rejected on appeal by the appellate court, which held:

> "The original contract could be terminated by either party in the manner therein set out; and while appellant did not, in so many words, declare its intention to terminate the contract and give the thirty days' written notice to appellee, yet its letter of August 22, 1934, had that effect; at least it was a declaration amounting to a breach of the terms of the contract in the matter of compensation to appellee. * * *
>
> "When appellant made this change in appellee's compensation at variance with the contract, he was called upon to elect whether he would accept the modified contract or rely upon the old and sue for its breach. **He could not continue his services under the new or modified contract and later rely upon the terms of the old**; his election must have been made within a reasonable time after the condition arose. Appellee continued in appellant's services with full knowledge of the new schedule of commissions and bonuses provided for in the letter of August 22, 1934; but of course **this continued service was not without protest; however, an earnest protest was not sufficient, he was called upon to act; this he did by continuing in the service.**"

In the present case after the company served the notice of October 22, 1938, the red caps were called upon to elect whether they would accept the change or treat the relationship as ended. In the language of the foregoing Texas decision, "An earnest protest was not sufficient," they were "called upon to act, and this they did by continuing in service." Petitioner would have this action of the red caps ignored and the situation treated just as though no

new terms of employment were laid down on October 22, 1938. But the red caps "could not continue their services under the new or modified contract and later rely upon the terms of the old." The action of the red caps was controlling; they worked thereafter under the only terms upon which continued employment was offered them.

This sound and equitable rule of law was also recognized by the United States Circuit Court, Tenth Circuit, in the case of **Shuppan v. Peoria Terminal Railway Co.**, 30 F. (2d) 569. In that case the Peoria Terminal Company found it necessary, because of its financial condition, to enter into a new arrangement with its employees relative to their wages. The employees were told that they could take their choice between one of two courses: either accept a certain wage, or, in the alternative, take and divide among them the receipts of the company, after deduction of the other costs of operation. Within a few days after these conditions were announced, the employees held a meeting and decided **they would not accept either proposal,** and they so advised the management of the Peoria Terminal Company. Shortly thereafter the general manager of the Peoria Terminal Company **posted a bulletin** outlining the manner in which wages would be handled. The Employees' Committee then wrote the manager again protesting and **stating definitely that they would not accept the terms of employment** as set forth in the Peoria Terminal Company's bulletin. Nevertheless, the employees continued to work thereafter (as did the red caps in our case), and the company then began to pay the employees as announced in the bulletin. After letting a year or so go by (as the red caps did in this case), the employees brought suit for the dif-

ference between the wages received by them and the wages they claimed they were entitled to under their previous arrangement. The court held that, despite their written notification that they would not accept the terms of employment offered, the employees by **remaining** in the employ of the company, accepted the company's proposal, stating at page 570:

> "Offered the alternative of accepting a wage cut or leaving the service, the men reported apparently to the effect that the wage cut was not acceptable. Still no one left the service. By remaining in the employ of the company they manifested more positively that the proposal that they leave the service was not acceptable.*
>
> "Only the company could fix the wages of those who were willing to work for it. Only the employees themselves could say for whom they would work. If either proposed terms of employment unacceptable to the other, nothing prevented the dissatisfied party from terminating the relationship. The company, having made it clear what wages it would pay its employees, those who took employment with it thereafter or **those who continued in its employment,** though mistaken as to the power of the company to fix wages, must be deemed thereby to have accepted the only terms upon which such continued employment was offered."

Petitioner's interpretation of the facts in the instant case (construing the letter of October 24, 1938, as a rejection of an offer), fits exactly the facts of the **Shuppan case.** Respondent on October 22, 1938, had advised each red cap in clear language that he would thereafter be permitted to work on its premises, engaging in the hand-

* It might be stated here that in the **Shuppan case** nothing was actually said in the employer's bulletin about leaving the service if the terms of the offer of employment were not acceptable.

ling of hand baggage and collecting tips for such service, on the **condition that such tips be accounted for and be applied upon a minimum wage** which the employer guaranteed to pay him. While the employees under date of October 24, may have entertained and expressed the view that the Respondent was not complying with the Act, and might even, for argument's sake, be said to have written a letter on October 24 refusing to work under the conditions laid down, nevertheless on October 24 and October 25, and ever since **they have worked.** Therefore, since Respondent made it clear to whom the ownership and control of tips would belong, under the principle of the **Shuppan case,** "those who took employment with it thereafter, or those who continued in its employment * * * must be deemed thereby to have accepted the **only terms upon which such continued employment was offered."**

Petitioner did not cite in the Circuit Court and has not cited in this court any authority contrary to the **Balfour** and **Shuppan cases.** Respondent submits that there is no contrary authority.

Petitioner undertakes to get away from the holdings in the **Shuppan** and **L. C. Balfour Company cases** by asserting that in the instant suit Respondent "conceded" or "recognized" through a letter written on December 6, 1939, and through Rule 16 of the Red Cap Agreement of January 1, 1940, that the question of the status of tips "was open for further determination by the Courts." It is not clear just what Petitioner means by such expression; but whatever is meant, an examination of the two instruments will demonstrate that they did not destroy or in any way affect the agreement consummated by the action of the

red caps, on and after October 24, 1938, in working under and in accordance with the terms of Respondent's notice of October 22, 1938.

On December 6, 1939, Murrell L. Buckner, Vice-President of Respondent, wrote a letter to Petitioner A. J. Pickett reading as follows:

"Dear Mr. Pickett:

"Referring to our conversation and letter which you showed me from Mr. Harrison in reference to the Kansas City Terminal agreement with the red caps.

"I have carefully read this agreement and I see nothing in it that is in any way out of line, except that Rule 6 would not apply to this property and Rule 17 is not clear.

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the court and as soon as same is decided we will be glad to negotiate an agreement with the Clerks Union of which you are the General Chairman for this Company.

"Very truly yours,

(Signed) MURRELL L. BUCKNER."

Subsequently, on January 1, 1940, a collective bargaining agreement was entered into, which, among other things, provided that no red cap should be dismissed without just cause and that any red cap should have the right of appeal to the highest officers of the company. The contract then contained this section (Tr. of R., p. 134):

"If the final decision decrees that the charges against the red cap were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the red cap shall be reinstated with seniority and rights unimpaired. The employee shall be reimbursed for any money losses suffered; provided

that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act,' the carrier is required to pay a wage to the red caps over and above any amounts that may be received by them as tips. (Note): This rule shall not be construed as requiring the carrier to reimburse red caps for loss of tips, either now or in the future."

Petitioner maintains that both of these documents show that the company admitted that the question of whether the plan was in operation was an "open one." In the letter of December 6th, Respondent did no more than acknowledge the existence of a lawsuit, and by the collective bargaining agreement, the parties merely agreed that in the event of an unjustified discharge of an employee, the wage loss would be settled in accordance with the provisions of the Fair Labor Standards Act as construed by the courts. The only effect of the letter and the collective bargaining agreement was to point out that litigation was pending, and to recognize the uncontroverted fact that the litigation would be decided in accordance with the Act.

So far as Mr. Buckner's letter of December 6th is concerned, Respondent has no hesitancy in saying now exactly what Mr. Buckner said then, namely, that "this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 a day is in the courts" and so far as the agreement of January 1, 1940, is concerned, Respondent has no hesitancy in saying now, accepting the interpretation of Petitioner as set forth on page 34 of his brief, that in such agreement "it was recognized that the question as to whether Respondent was required to pay a wage in addition to tips was to be determined by the courts." Respondent does not consider that it is making any significant concession when it admits that this Court has full

authority and jurisdiction to pass upon the effect of Respondent's notice of October 22, 1938, and to determine whether or not Respondent was within its rights in exercising control over the income in the form of tips received for the performance by it of a service through its employees. This is the **only** distinction that Petitioner undertakes to make between the **L. G. Balfour Company** and **Shuppan cases** and the instant suit, namely that in the latter it was recognized that the courts were passing upon the legality of the accounting and guarantee arrangement, The courts **are** passing upon the matter—seven courts to date; and the courts also passed upon the matter in the **L. G. Balfour Company** and **Shuppan cases**—and adversely to the position of Petitioner.

That the matter is subject to litigation, however, does not take this case out of the rule as laid down in the **Shuppan case**, nor the rule of the **L. G. Balfour Co. case**, which is the law in Texas. It does not operate to destroy retroactively the effectiveness of the notice of October 22, 1938, or to change the effect of the action of the red caps on and after October 24, 1938, in working under the terms of the notice, taking advantage of the opportunity thereby afforded them to make a good living on the privately owned premises of Respondent, accounting for the tips that they were thereby enabled to obtain, and accepting Respondent's checks covering any deficit. And it does not affect the soundness of the basic proposition asserted herein, namely, that the notice of October 22, 1938, and the con-

duct of the red caps thereafter, imposed upon them the terms of the notice providing that tips were to be credited on the guaranteed minimum wage, and such terms became and continued to be a lawful and indivisible part of the contract of employment.

POINT III

Nothing in the Railway Labor Act or Interstate Commerce Act operates to nullify the effectiveness of Respondent's notice of October 22, 1938.

Authorities in Support of Point III

Buffington v. Owosso Mfg. Co., 105 F. (2d) 692;
Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285;
Harrison v. Kansas City Terminal Ry. Co., 36 F. Supp. 434;
Harrison v. Pullman Company, 68 F. (2d) 826;
Loomis v. Lehigh Valley Railroad Co., 240 U. S. 43;
Midland Valley R. Co. v. Barkley, 276 U. S. 482;
Minnesota Rate Cases, 230 U. S. 352;
Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247;
Rochester Tel. Corp. v. United States, 307 U. S. 125;
St. Louis, B. & M. Ry. Co. v. Brownsville Navigation District, 304 U. S. 295;
Texas & Pacific R. Co. v. American Tie and Timber Co., 234 U. S. 138;
Union Terminal Co. v. Pickett, 118 F. (2d) 328;
Virginian Railway Company v. System Federation No. 40, 300 U. S. 515.

Argument in Support of Point III

A. Railway Labor Act

Under his Point II Petitioner advances the argument that the notice of October 22, 1938, did not accomplish its purpose of exercising control and ownership of tips and did not become a part of the employment contract of the

red caps due to the fact that on October 11, 1938, Petitioner wrote a letter (Tr. of R. 142) to Respondent stating that the red caps had authorized his organization to represent them in the making of a working agreement and suggesting a conference for the purpose of exhibiting such authority and negotiating an agreement covering working conditions.

Petitioner asserts that after receipt of this letter of October 11th, Respondent, under the first and second paragraphs of Section 2 of the Railway Labor Act, was required "to exert every reasonable effort" to negotiate an agreement covering rates of pay, rules and working conditions. Petitioner then assumes, without any proof, that Respondent did fail to exert reasonable effort and concludes that Respondent's action of October 22, 1938 (which Petitioner terms "unilateral") was therefore void.

The Fair Labor Standards Act became effective on October 24, 1938. Respondent was required to comply with its terms or subject itself to the very stringent criminal penalties of the Act. But Petitioner argues that Respondent could not comply with the Fair Labor Standards Act because a compliance would mean a change in rate of pay or manner of payment, which, according to Petitioner, would be a violation of the Railway Labor Act. So, if this proposition of Petitioner be correct, Respondent could not have complied with the Fair Labor Standards Act even by a notice to the red caps (presumably unless preceded by some action in response to Petitioner's letter of October 11) that beginning October 24, 1938, the red caps would be paid 25¢ an hour, because such action would have been in violation of the Railway Labor Act and, therefore, void.

Respondent submits that paragraphs first and second of Section 2 of the Railway Labor Act do not contemplate that the carrier take no action with respect to its business pending the negotiation of a collective agreement, nor do they contemplate that any action taken in the interim shall be void. If a carrier refuses to negotiate (although no refusal was shown in this case) remedies are provided in the Railway Labor Act. Those remedies, however, do not include the denial to a carrier of the right to conduct its business in the meantime in accordance with all laws. On the contrary it must continue to conduct its business and it certainly must act when its failure to do so would be a violation of the Fair Labor Standards Act.

In support of the novel proposition that Respondent's compliance with the Fair Labor Standards Act was void because it was in violation of the Railway Labor Act, Petitioner cites the case of **Virginian Railway Company v. System Federation No. 40**, 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592. The latter case is the sole authority cited by Petitioner. We submit that the real holding in the **Virginian Railway Company case** is directly against Petitioner. On pages 548 and 549 the Supreme Court stated:

> "Petitioner's insistence that the statute does not warrant so much of the decree as forbids it to enter into contracts of employment with its individual employees is based upon a misconstruction of the decree. Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. * * * We think, as the Government concedes in its brief, that the injunction against Petitioner's entering into any contract concerning rules, rates of pay and working conditions,

except with respondent, **is designed only to prevent collective bargaining with any one purporting to represent employees, other than Respondent,** who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than Respondent, **but not as precluding such individual contracts as Petitioner may elect to make directly with individual employees."**

In a footnote the Supreme Court quotes from the Government's (amicus curiae) brief in part as follows:

> "Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine."

Apparently neither the Supreme Court nor the Government considered that the term "unilateral action," decried by Petitioner in his brief, carries any particularly abhorrent implication (although we might say here that the notice of October 22, 1938, was unilateral **only until the red caps went to work in keeping with its terms** on and after October 24, 1938).

Collective agreements require time to negotiate and consummate, as is evidenced by the fact that the present existing agreement was not completed and executed until January 1, 1940, and obviously Respondent could not have ignored the Fair Labor Standards Act until that date without subjecting itself to the very severe penalties of the Act.

The argument advanced by Petitioner is grounded upon a further fallacy in its assumption that Respondent refused or failed to negotiate with Mr. Pickett or was guilty

of some unreasonable and unlawful delay in connection therewith. Petitioner states that on October 11, 1938, Mr. Pickett wrote Respondent suggesting a conference. Petitioner states that it then became the duty of Respondent "to exert every reasonable effort" to make an agreement. But Petitioner wholly fails to point out wherein the record discloses any failure on the part of Respondent to reply to the letter of October 11, 1938, or to exert such "reasonable effort" as Petitioner may have in mind (but which is left vague and undefined in Petitioner's argument).

The date of the next letter appearing in the record is December 26, 1938, a letter written by Mr. Pickett to Mr. Buckner, general manager of The Union Terminal Company. However, the opening sentence of this letter reads:

> "Enclosed you will find a draft of the proposed agreement as **requested** covering the red caps." (Tr. of R. 143.)

It is obvious from this sentence that one or more communications, oral, written, or both, had theretofore moved from Respondent to Pickett, including a request for the draft of the proposed agreement. The record is silent as to the number or dates of such communications.

Petitioner offered no testimony to the effect that Respondent delayed any suggested conference or failed to reply to any letter, although Petitioner now takes the position that such fact, if developed, would be material. Although Petitioner placed upon the witness stand several officials of the red caps' organization, including the secretary, who presumably were familiar with the situation, none of them was asked by counsel for Petitioner whether or not a reply to the letter of October 11, 1938, was re-

ceived by the organization or whether or not there was any delay in conferences. The nearest approach that Petitioner made to the subject under discussion came in response to the first question propounded by Petitioner's counsel to L. H. Akers, assistant general chairman of the organization (Tr. of R. 199):

> "Q. Were you familiar with the meeting that took place **at various times** with Mr. Buckner and the officials of the defendant company **from** October 11, 1938, up to the time of the signing of this agreement dated January 1, 1940?
>
> "A. Well, yes, sir, more or less; I was more or less familiar with it."

The date of the first meeting or conference is not developed in the record, except as the foregoing question and answer may indicate that it was on or after October 11, 1938. Mr. Pickett, who wrote the letter of October 11th, did not testify. It obviously did not occur to either party in the trial court that the matter was of any importance (nor does Respondent consider it of any importance now). If Petitioner should suggest that Respondent made no affirmative offer of proof of compliance with the Railway Labor Act, we would reply that neither in the complaint, nor in any other instrument, argument or even suggestion filed with or made to the trial court was Respondent charged with a violation of the Railway Labor Act. And had it been, the burden would certainly have been upon Petitioner to sustain any such charge. In this connection, we wish to point out that the alleged violation of the Railway Labor Act was raised by Petitioner for the first time in the Circuit Court, and therefore could not be considered now even if it were material, which it is not.

In the case of **Harrison v. Pullman Company**, 68 F. (2d) 826, a Pullman porter brought suit against the Pullman Company for alleged wrongful discharge. In the trial court, recovery appears to have been sought principally upon the ground of breach of contract in failing to give to the employee a hearing as to the cause for his dismissal. In the Circuit Court, the employee asserted for the first time that in dismissing him the Pullman Company had violated the Railway Labor Act, thereby entitling him to recover. The substance of the court's holding is concisely stated in syllabus 2 on page 826:

> "Where no right to relief in trial court was predicated on violation of Railway Labor Act, but Pullman porter sued for wrongful discharge alone, such act could not be relied on in appellate court. (Railway Labor Act, paragraph 2, subsection 3, 45 U. S. C. A., section 152, subsection 3.)"

In the language of the court (Eighth Circuit), page 827:

> "Appellant, in this court, by additional assignment of error, denied because not justified by the record, seeks to invoke the provisions of the Railway Labor Act of May 20, 1936 (45 U. S. C., Sec. 152, subsec. 3), claiming that the evidence discloses coercion of employees in violation of said act. No reference to this act is contained in the pleadings, nor was this contention brought to the attention of the trial court. The contest below concerned the application of the contract sued on and whether appellant had so far brought himself within its terms as to justify this action for its breach.
>
> "The motion for a directed verdict was properly sustained, and the judgment below affirmed."

This decision was cited and followed in the case of **Buffington v. Owosso Mfg. Co.**, 105 F. (2d) 692. In a reply brief filed in the Circuit Court, the plaintiff called atten-

tion to certain Arkansas statutes, taking the position that they should be considered in connection with the defenses relied upon by the defendant. The court held (page 697):

> "Plaintiff urges that under these statutes the defendant was barred from asserting the defense of assumed risk. In addition to the fact that the statutes relied on were not referred to in the pleadings, nor in any manner called to the attention of the trial court, which would, in our opinion, preclude any consideration of it by this court, * * *". (Citing a number of authorities.)

We invite the court's attention to Petitioner's complaint. (Tr. of R. 26.) The Fair Labor Standards Act is alleged to have become effective on October 24, 1938, and the only complaint against Respondent consists of an alleged failure to comply with such Act from October 24, 1938, to the date of the filing of the complaint, March 6, 1940. No act or omission by Respondent prior to October 24, 1938, is alleged. The Railway Labor Act is not mentioned.

A brief was filed by Petitioner in the trial court in opposition to Respondent's motion for a new trial, and can be found in the Transcript of Record, pages 87 to 104. This brief not only fails to call the trial court's attention to any alleged violation of the Railway Labor Act, but on page 90 of the Transcript of Record (the only place where the Act is mentioned) specifically recites that both parties had undertaken to comply with such Act, the language used by Petitioner being:

> "Both the Fair Labor Standards Act and the Railway Labor Act are intended to promote commerce by avoiding strikes to settle labor disputes, and both parties hereto attempted to carry out such purpose by entering into negotiations for a working agree-

ment to govern the relations between defendant and the red caps."

Thus not only does the record fail to establish any unreasonable delay upon Respondent's part in proceeding with negotiations, but Petitioner appears to have conceded that both parties undertook to negotiate and did negotiate a working agreement under the Railway Labor Act. Petitioner's effort to reverse himself and to raise a new and wholly unsound theory in the Appellate Courts must fail on any one of the several counts pointed out herein.

B. Interstate Commerce Act

Petitioner, still seeking a recovery under the Fair Labor Standards Act, undertakes to inject the Interstate Commerce Act into the picture. Making an argument similar to that in which he undertakes to call to his aid the Railway Labor Act, Petitioner urges that the appropriation of tips by Respondent would be a violation of the Interstate Commerce Act because its effect would be to make a charge to passengers that is not uniform and is not filed with the Interstate Commerce Commission. He then argues that Respondent's compliance with the Fair Labor Standards Act is void because in some particulars it violates the Interstate Commerce Act; and that the red caps are thus left unpaid under the Fair Labor Standards Act, although admittedly they received and kept the money covering their wages. In other words, it is urged that Respondent improperly took from the passengers the money with which wages were paid, and that therefore the red caps, although keeping such money, should be paid another wage out of funds properly obtained by Respondent. Small

wonder that Judge Merrill Otis in the **Kansas City Terminal case, supra,** termed this a "most curious argument."

Questions involving the propriety of charges and related questions arising under the Interstate Commerce Act must be submitted to and ruled upon by the Interstate Commerce Commission before they can be proper subject matter for consideration by a court of law. This court has so held in several cases. In **Loomis v. Lehigh Valley Railroad Co.,** 240 U. S. 43, involving a claim of shippers for sums expended in constructing grain doors in cars furnished by a carrier, the court said:

> "An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns ratemaking and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Co., 237 U. S., pp. 128, 129; Pennsylvania R. Co. v. Clark Coal Co., 238 U. S., pp. 469, 470."

In **Texas & Pacific R. Co. v. American Tie and Timber Co.,** 234 U. S. 138, the general rule was stated thus:

> "* * * for the preservation of the uniformity which it was the purpose of the act to regulate commerce to

secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission."

See also **Mitchell Coal & Coke Co. v. Pennsylvania R. Co.**, 230 U. S. 247; **Minnesota Rate Cases**, 230 U. S. 352; **St. Louis, B. & M. Ry Co. v. Brownsville Navigation District**, 304 U. S. 295; **Midland Valley R. Co. v. Barkley**, 276 U. S. 482, and **Rochester Tel. Corp. v. United States**, 307 U. S. 125. See, also, the list of cases to the same effect in footnote to **Great Northern Railway Co. v. Merchants Elevator Co.**, 259 U. S. 285, at 295.

The question of whether or not this is a service covering which a tariff should be published, or whether or not some passengers have been discriminated against as compared to other passengers, are questions for the determination of the Interstate Commerce Commission and can only be raised by complaint filed with that body by some person affected by the so-called charge, such as a passenger who has paid it. As in the case of the Railway Labor Act, the Interstate Commerce Act provides for its own processes and its own remedies. If, by appropriate proceedings before the Interstate Commerce Commission, it be determined that payments for this service performed by Respondent should be reflected in a published tariff, Respondent will be governed accordingly. But any such proceeding or the result thereof, could have no bearing upon the relationship or the reciprocal obligations, past or future, between Respondent and its employees. If a carrier should collect freight charges not uniform or not covered by a published tariff and should pay wages to its employees out of funds thus collected, the shipper involved might com-

plain in a proper proceeding, but the employees could hardly be heard to say that they are entitled to their wages again out of different funds. As the United States Circuit Court herein pointed out with reference to this argument of Petitioner:

> Nor do we think it lies in the red caps' mouths to say that the whole idea of letting the passenger fix the amount of compensation for porter service is repugnant to the Interstate Commerce Act as discriminating in favor of the passenger who pays less and against one who pays more. But if they can urge it, and if this is a transportation service requiring uniformity of charge, and if a court rather than the Interstate Commerce Commission may deal with it, the wrong would not be righted by giving a red cap this money and double wages besides."

This holding of the Circuit Court **is not challenged** by any Specification of Error (See Petitioner's "Specifications of Error," pages 10 and 11 of his brief), nor in Petitioner's motion for a rehearing filed with the Circuit Court. We submit that the Circuit Court was correct, and that there exists no right in the red caps to have a double wage paid out of the funds of Respondent **other** than those received from passengers in payment for red cap services.

POINT IV

The Terms of Employment contained in Respondent's notice of October 22, 1938, were in full compliance with both purpose and language of the Fair Labor Standards Act.

Authorities in Support of Point IV

Alexander Hamilton Hotel Corp. v. Board of Review, 21 A. (2d) 739;

Bryant v. Pullman Company, 177 N. Y. S. 488;

In Re Club Troika, 2 N. L. R. B. 90;

Federal Underwriters Exchange v. Husted, 94 S. W. (2d) 540;

Gross' case, 166 Atl. 55;

Keifer and Keifer v. Reconstruction Finance Corporation, 306 U. S. 381;

Lincoln v. Ricketts, 297 U. S. 373;

Lloyds Casualty Company v. Meredith, 63 S. W. (2d) 1051;

Ozawa v. United States 260 U. S. 178;

Powers' case, 176 N. E. 621;

Sloat v. Rochester Taxicab Company, 163 N. Y. S. 904;

United States v. American Trucking Association, Inc., 310 U. S. 534;

United States v. Stone & Downer Co., 274 U. S. 225;

Webster's International Dictionary, 2nd Edition;

In Re Willard, 2 N. L. R. B. 1094;

Williams v. Jacksonville Terminal Co., 35 F. Supp. 267;

Williams v. Jacksonville Terminal Co., 118 F. (2d) 324.

Argument in Support of Point IV

A. Purpose of the Act

It is axiomatic that in obtaining a reasonable statutory construction the intent of Congress is an all-important factor: **United States of America v. The American Trucking Association, Inc.**, 310 U. S. 534; **Ozawa v. United States**, 260 U. S. 178, and **United States v. Stone & Downer Co.**, 274 U. S. 225, 239. In the **Stone & Downer Co. case**, at page 239, the court also stated that the "greatest light is thrown on that intention in this case by an examination of the existing conditions and the anticipated evils against which * * * Congress sought to protect the country." Of similar import is **United States v. American Trucking Association, supra**, wherein this court stated that in construing a statute, "Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." This court then went on to say:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet many needs of a major occupation. There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked

beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one * * * plainly at variance with the policy of the legislation as a whole this court has followed that purpose, rather than the literal words."

The Fair Labor Standards Act has a "finding and declaration of policy" section, and there the purpose of the Act is plainly stated. It is submitted that, so far as wages are concerned, that purpose is to require a minimum quantum of compensation for the employee covered thereby so that he may maintain a minimum standard of living. Section 2 of the Act provides:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor **conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers** (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable **to eliminate the conditions** above referred to in such industries without substantially curtailing employment or earning power."

Manifestly, by this Act, Congress sought to eliminate "labor conditions detrimental to the maintenance of the

minimum standard of living necessary for health, efficiency, and general well-being of workers" because the existence of these labor conditions caused their spread via interstate commerce among workers in all states and caused certain burdens and obstructions to commerce.

The means adopted by Congress of eliminating wages below the level necessary for a minimum standard of living was to prescribe a minimum hourly wage of 25 and 30 cents. Obviously, the "minimum standard of living wages" would be assured where, as here, the compensation **received** by an employee for services furnished to Respondent's patrons, and on its behalf, equaled or exceeded 25 or 30 cents per hour. There is nothing in Section 2 which indicates that the policy or purpose of the Act was not only to see that the "minimum standard of living wages" were paid to employees but also to see that those wages were paid in some particular manner. As the result to be accomplished was the **receipt** by the **employee** of 25 cents an hour for each hour of work, it was entirely consistent with the policy of the Act to put into effect the accounting and guarantee plan. Twenty-five cents received as tips in an hour and retained by Respondent's permission was just as useful as 25 cents taken from the general treasury of Respondent in maintaining the minimum standard of living for health, efficiency and general well-being of the worker. It could be used to the same extent in paying for food, shelter and clothing, upon which health, efficiency and general well-being depend.

The accounting and guarantee plan definitely insured the receipt by each red cap of 25 cents for each hour of work. If the tips reported by a red cap did not equal the

minimum of 25 cents an hour, Respondent paid him the deficiency. Consequently, the purpose of the Act was accomplished in the case of red caps.

That the accounting and guarantee plan fully complied with the purpose of the Act was pointed out forcibly by the court in **Williams v. Jacksonville Terminal Company**, 35 F. Supp. 267:

> "The intent of an act is the essence thereof, and the intent thereof should be given effect as against the mere words of an act when the mere words, construed alone, would produce legislative or judicial brigandage. The Court believes that the wording of the Act in defining 'wages' provides that things other than the direct payment of money can be used in the payment of wages. The plaintiffs here were paid in money, but in an indirect way—through facilities afforded the plaintiffs by defendant. No question of determination of 'reasonable cost' is involved. They were compensated in money which the defendant had the legal right to collect and to keep if it rendered the services through its employees as contended. There can be no substantial difference between compensation for services rendered and wages for services rendered.
>
> "Congress intended to secure to employees at least a minimum compensation for the hours of service performed. It never intended that Section 6 of the Act should do more than that. In the present case the plaintiffs, as a group, received out of their relationship, or employment, some $3,000.00 in excess of the minimum wage required by law. They here seek to be paid again all sums which they have received out of their relationship, or employment, plus an equal amount as liquidated damages, plus attorney's fee. I subscribe wholeheartedly to the real purpose of the Act as I conceive it, but I cannot ascribe to Congress the superlative folly of intending that an employee, under the circumstances of this case, wherein no element of willfulness is involved, should recover the minimum wage thrice multiplied."

B. Language of the Act

It is next necessary to determine whether the language of the Act, other than that of the preamble, requires that the Act be construed so as to insure not only a minimum wage but also a method of securing the wage which would result in this particular class of Respondent's employees receiving, in a majority of cases, double the minimum income assured by the Act. Such a construction of the Act plainly does not serve its policy and purpose. Does the language of the Act justify a construction not in keeping with such policy and purpose?

The Petitioner argues that Congress has used "words" and he wants these words, "Every employer shall pay * * * wages" construed as meaning that dollars must move manually from employer to employee. We will undertake to show that they cannot be applied as Petitioner desires without producing results which are contrary not only to the sense in which Congress used them as shown by the provisions of the Act itself, but also to dictionary definitions, decisions of the courts, and decisions of administrative tribunals.

1. Reasonably construed, the words "shall pay wages" do not require an employer manually to transfer payments from its general treasury to the employees, and "tips" (paid for services rendered by the employer and retained by the employee by permission of the employer) are embraced within the meaning of these words if accounted for and guaranteed as is here the case.

(a) Section 6 provides that "(a) Every employer shall pay to each of his employees who is engaged in commerce

* * * wages * * * at the rate of not less than 25 cents an hour during the first effective year of the Act, etc." As stated in **Lincoln v. Ricketts**, 297 U. S. 373, a settled rule of statutory construction is to give the words "their natural significance," and that will be our purpose here.

The meaning of the word "pay" is the first important determination to be made in this section of the Act, inasmuch as its meaning is significant in determining whether there must be a manual transfer of wages from the employer to the employees. In this regard, it is clear from the standard dictionary definition of the word "pay" that no manual transfer of wages is a prerequisite to the "payment" of wages. Standard definitions of the verb "pay" include the following: "to satisfy (another person) for services rendered, property delivered, etc.; to discharge one's obligation to; to make due return to; to compensate; remunerate; recompense; requite; as to pay workmen or servants." Also, among its common synonyms are such words as recompense, requite, reward, repay, satisfy, compensate, remunerate, reimburse, indemnify.* From the above definitions of the verb "pay," and its synonyms, it is manifest that a very common meaning of "pay" is to discharge one's obligation to a person for services rendered or to satisfy or compensate that person for services rendered. So far as "pay" is concerned there is nothing in the standard dictionary definition or synonyms of the word that indicates that the discharge or satisfaction of the obligation for services rendered or the compensation for services rendered must be by a manual transfer

* See Webster's International Dictionary, 2nd Edition.

of money or other medium of payment from the payor to the payee.

It is to be noted that Congress does not use the word "wages" uniformly throughout the Act when referring to an employee's remuneration. Thus, Section 7 limits the number of hours in the work week "unless such employee **receives compensation** for his employment in excess of the hours * * * specified at a rate not less than one and one-half times the regular rate at which he is employed." If, as Petitioner argues, the word "wages" has such a narrow meaning as to exclude the consideration of tips and was used by Congress with the definite purpose of excluding the use of tips in payment of wages, why did not Congress use the term 'wages' in Section 7? Compensation is generally understood to include within its meaning an equivalent or recompense, or something which compensates for loss or privation,* and under the company's accounting and guarantee plan tips were a recompense or remuneration received by the red caps in the course of their employment and must therefore be considered in determining overtime compensation.

Let us see what absurd results are produced by giving to the words of Sections 6 and 7 of the Act the meaning Petitioner would give to them. Section 6 provides that every employer shall pay a wage of 25 cents or 30 cents per hour. The Petitioner claims that this requires the employer to make manual delivery of these amounts. Section 7 provides, in substance, that when services are rendered over 40, 42 or 44 hours per week, the employee shall

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* See Webster's International Dictionary, 2nd Edition.

receive compensation of 37½ cents (1½ x 25¢), or 45 cents (1½ x 30¢) per hour for the overtime hours. If Petitioner's construction of these two sections is carried to a logical conclusion, the result would be that for the first 40, 42 or 44 hours, the employer must pay 25¢ or 30¢ per hour from his general treasury funds, but for the overtime hours tips may be used in computing the entire compensation or, at the least, in computing the overtime compensation (50% of the base wage). Such a result is unthinkable.

Of course every legislative act which involves payment of wages, treats and refers to wages as consideration or remuneration moving from employer to employee. The existence of the relationship assumes that the consideration or pay for the services performed so moves. If the consideration for services did not come from the employer, the latter would not have the right to direct the details and manner of work, and the relationship of master and servant would not exist. All Workmen's Compensation Acts, so far as we know, speak of consideration or pay received by the employee from the employer. That is particularly true of the Texas Workmen's Compensation Act; and yet, despite the language contained therein defining wages as remuneration "which the employee **receives from the employer**" (Article 8309, Vernon's Annotated Texas Statutes) the Texas courts uniformly hold that tips received from a third person for whom the employer is rendering a service through his employee are within such definition and are wages received from the employer. (See **Federal Underwriters Exchange v. Husted**, 94 S. W. (2d) 540, and authorities cited therein, and more particularly referred to hereinafter.)

In effect, Petitioner argues that under the language of Section 6 of the Act, an employer is not paying wages to an employee even though he is seeing to it that funds in equal amount belonging to him are received by the employee. Suppose A is an employer, subject to the Fair Labor Standards Act, who manufactures and sells goods and he employs B as a salesman; A places in B's hands an article that A is offering for sale at a price of $10.00 and A agrees to pay B 10% on his sales. A of course must comply with the Fair Labor Standards Act by guaranteeing the minimum wage to B. B then sells the article for $10.00 and retains $1.00 (being 10% under the agreement). Has A not paid B the $1.00, or must A pay him a full minimum wage in addition merely because, as argued by the Petitioner, the $1.00 was placed in B's hands by A's patron and did not move manually and directly from A? That is the exact burden of Petitioner's argument in urging the adoption of his construction of Section 6 of the Act.

(b) There is no implication in the provisions of Section 3(m) as argued by Petitioner (page 69) that tips may not be accounted for as wages in satisfaction of the requirements of Section 6.

In Section 3(m) "wage" is described as including certain remuneration received in other forms than cash, the Act reading:

> "(m) 'Wage' paid to any employee includes the reasonable cost, as determined by the administrator, to the employer of furnishing such employee with board, lodging or other facilities if such board, lodging or other facilities are customarily furnished by such employer to his employees."

It is well known that employees often live in lodgings provided by their employers or are furnished board by their employers. Obviously, the furnishing of these and similar facilities does not amount to payment in cash or in negotiable instruments payable at par, the usual media for wage payments in connection with which there is no question of the value of the payment. It was clear that the employer might place an inflated value on lodgings and other facilities furnished to an employee and that where such facilities had not been furnished by the employer in the past to employees, or by employers in similar businesses, employers might force such facilities on employees in an attempt partly to discharge the obligations imposed by the Act. Therefore, the wording of Section 3(m) was designed to protect employees from unreasonable "wage" credits based on the value of lodgings and other facilities, which would give the employer a profit in the furnishing of the facilities, and to prevent such "wage" credits where such facilities are not customarily furnished. That this is the purpose of Section 3(m) is supported by Interpretative Bulletin No. 3, Wage and Hour Division, entitled "General statement as to method of payment under the Fair Labor Standards Act," dated October 21, 1938, as revised August 1, 1940, in which it is stated that:

> "It is Section 3(m) which permits and governs the payment of wages **in other than cash.**"

Employees are ordinarily paid for their services in cash or by check. The payment of tips is in cash, and when accounted for under a plan such as that instituted by the Respondent, cannot conceivably result in any profit to the

employer. It is absurd to emphasize that Respondent's patrons pay the tips and that therefore the employer profits, for in every "service" business funds with which employees are paid only exist because of payments by patrons for services performed by the employees. Therefore, the specific provision in Section 3(m) with regard to media for the payment of wages which are in no respect similar to the "cash" medium of payment involved in tipping under the accounting and guarantee plan can be of no moment in determining the question here under consideration.

As the Circuit Court in the case of **Williams et al. v. Jacksonville Terminal Co., supra**, said:

> "The provision of Section 3(m), 29 U. S. C. A. Sect. 203(m), 'Wage paid to any employee includes reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging or other facilities * * *,' refers to wage payments other than in money, and has no bearing upon the case. No credit on wages is claimed by reason of anything furnished, except the money retained by the employee."

Congress has, when it so desired, expressly excluded tips in dealing with compensation. In this connection a very pertinent discussion is found in the **Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included within the Term "Employee under the Railway Labor Act,"** 229 I. C. C. 410, 416, 417. In that proceeding the Interstate Commerce Commission found that red caps were employees within the meaning of the Railway Labor Act even though they received no compensation except from tips. In considering this question the Commission was confronted with the fact that persons

who receive no compensation other than from tips are not subject to the Railroad Retirement Act of 1935,* and in this regard stated, in part, as follows:

> "The Railroad Retirement Act of 1935, as amended June 24, 1937, specifically provides that persons who receive no compensation other than tips are not subject to that act. * * * From the fact that persons who receive no compensation other than tips are not excepted, as is the case in the Railroad Retirement Act, it may be presumed the Congress did not intend to restrict the Railway Labor Act."

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* It is of peculiar interest to note that while the Railroad Retirement Act specifically excludes tips, nevertheless after the adoption of the accounting and guarantee plan, the General Counsel of the Railroad Retirement Board held (see October, 1941, Bulletin of Railroad Retirement Board, p. 20) that the pay received by red caps under such plan was not included in such exclusion. After setting out the plan (identical with Respondent's notice of October 22, 1938) and calling attention to Section 1(h) of the Act reading:

> "The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers. Such item does not include tips. * * *"

it was stated:

> "The question then is whether under the arrangement in question it is 'tips' as above described which the 'red cap' 'earns' or which is 'payable' to him for his services to his 'employer.' That question can be answered only in the negative. In place of an arrangement whereby the red cap (insofar as he received gratuities from railroad patrons) had no claim whatever against the employer, and the red cap was under no obligation to account for his receipts from his employer's patrons, we have an arrangement for a definite guarantee that the red cap will be compensated in 'not less than' a certain minimum amount, and an explicit engagement by the employer to permit the 'red cap' to retain all gratuities received from the employer's patrons subject to their being reported and credited against the guaranteed amount. There are material differences between the situation existing under the former arrangement (the one which Congress had in mind in excluding 'tips' from 'compensation') and the one in question in view of the added obligations under the latter on both the red caps and the employer. When these material differences are considered together with the fact that there has been removed the administrative difficulty involved in crediting payments received in the form of 'tips,' which difficulty was the principal reason Congress had for excluding such payments, it cannot be doubted that whatever the red cap earns under the guarantee arrangement, it is not such 'tips' as Congress had excluded from 'compensation.'"

The foregoing interpretation of the Railway Labor Act by the Interstate Commerce Commission is based on a rule of construction often prescribed by this court. Thus in **Keifer and Keifer v. Reconstruction Finance Corporation**, 306 U. S. 381, the court had to determine whether the Regional Agricultural Credit Corporation was subject to suit where the cause of action sounded in tort. Pertinent to our present problem are the following remarks of the court (pp. 385, 396):

> "When it chose to do so, Congress knew well enough how to restrict its consent to suits sounding only in contract, even with all the controversies in recondite procedural learning that this might entail. * * * In the light of these statutes it ought not to be assumed that when Congress consented to suit without qualification, the effect is the same as though it had written in suits on contract, express or implied, in cases not sounding in tort. No such distinction was made by Congress, and no such interpolation into statutes has been made in cases affecting government corporations incorporated under state law or that of the District of Columbia. There is equally no warrant for importing such a distinction here."

It should be said with equal justification here that it ought not to be assumed that when Congress used the term "wages" it meant the same thing as if it had written "wages (but wages shall not include tips)." On the contrary, in view of the foregoing express provision in the Railroad Retirement Act and the settled rule of statutory construction adopted by the Commission and the Supreme Court in the foregoing cases, Respondent submits that the failure of Congress to "put into the Act anything else under the head of wages which might be construed into an exclusion of tips" is a manifestation of the fact that

Congress did not intend that the term "wages" should not include tips.

2. In other social legislation the words "shall pay wages" or words of substantially the same connotation have been held to include tips within their meaning.

It is submitted that it has now been shown that the accounting and guarantee plan was consistent with the purpose of Congress; that a contrary construction would not serve that purpose in any respect, and that the bare language of the Act does not in any way impel an interpretation of Section 6 which would not have any relation to the Congressional intent. These compelling arguments clearly support Respondent's position that its accounting and guarantee plan fully complied with the mandate of Section 6 of the Act. However, the interpretation of such words appearing in other statutes has been favorable to Respondent, and the term "pay wages" and words of substantially the same meaning, have not been interpreted to require the manual transfer of compensation for services rendered from the employer to the employee.

(a) The decisions under Workmen's Compensation Statutes support the Respondent's interpretation.

In **Sloat v. Rochester Taxicab Company, supra,** which has been quoted from hereinbefore, the court held that tips should be considered in determining the compensation payments to be made to an injured employee under the New York Workmen's Compensation law. In this regard, the pertinent part of the statute provided that the amount of the compensation should be based on:

> "The money rate at which the service rendered is recompensed under the contract of hiring in force at

the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantages **received from the employer.**"

The court pointed out that the employee could not have received the tips if the employer had not put him in the way of receiving them and concluded that tips should be included under the statute.*

Further support for Respondent's position is found in the Texas courts, which in two cases have determined that, under the Texas Workmen's Compensation Act, defining wages as remuneration "which the employee **receives from the employer,**" tips are wages. **Lloyds Casualty Company v. Meredith,** 63 S. W. (2d) 1051, and **Federal Underwriters Exchange v. Husted,** 94 S. W. (2d) 540. It is true that the Texas statute provides that compensation shall be based on wages and "other advantages received by the injured employee as part of his remuneration and which can be estimated in money," but the courts found tips to be "wages" under the statute and not "advantages," as is clearly reasonable since tips do not need to be "estimated in money."

Similarly persuasive is the decision of the Supreme Court of Maine in **Gross' case,** 166 A. 55. There the statute under consideration provided that compensation should be based on "wages, earnings, or salary," and that benefits received from any other source than the employer should **not** be taken into consideration. After considering and citing many compensation acts, and decisions construing them to include tips in the computation of average weekly wages; the court concluded that tips were not ben-

* To the same effect, **Bryant v. Pullman Company,** 177 N. Y. S. 488.

efits received from any other source than the employer. The court said: "No broad distinction between the word 'earnings' and the word 'wages' is apparent."*

The case of **Alexander Hamilton Hotel Corporation v. Board of Review of the New Jersey Unemployment Compensation Commission** (New Jersey), 21 A. (2d) 739, which is cited on pages 74 and 75 of the Petitioner's brief, is not entitled to weight. In the first place, a review of the authorities indicates that the rule in New Jersey is the minority rule. Again, the opinion shows that the Supreme Court of New Jersey was influenced by the fact that in the Workmen's Compensation Act of New Jersey tips are excluded in ascertaining wages. The court said (p. 743):

> "Moreover, our Workmen's Compensation Act embodies a policy different from most. In defining the term 'wages' it specifically excludes 'gratuities received from the employer or others.'"

Finally, the New Jersey Supreme Court was considering ordinary, unguaranteed tips, not accounted-for and guaranteed tips, such as we are considering in this case. Thus, in its opinion, the court discusses the Social Security Act and a ruling by the Bureau of Internal Revenue to the effect that tips not accounted for by the employee to the employer are not wages paid by or payable by the employer. (In the next subsection of this brief we show that the Bureau of Internal Revenue ruled, however, that accounted-for and guaranteed tips were wages paid by or payable by the employer. This distinction between guaranteed and unguaranteed tips must be borne in mind in

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* See also Powers' case, (Massachusetts) 176 N. E. 621.

considering State Unemployment Insurance and Minimum Wage Acts.)

(b) The federal and state social security laws support Respondent.

The Social Security Act contains the phrase "wages paid by him" (the employer) and the phrase "wages payable by him" (the employer). Under such statute so phrased the Bureau of Internal Revenue of the Treasury Department has determined that tips reported to the employer for the purpose of enabling the employer to compute the sum due the employee under a guaranteed income constitute wages paid by the employer or wages payable by the employer. In **Internal Revenue Bulletin No. 25**, issued on June 20, 1938, there appears on page 18 the determination of the bureau on this point:

> "Question 4. If a hotel or restaurant guarantees its waiters a fixed income consisting of remuneration paid by the restaurant and partly of the tips, does such a guarantee affect the status of the tips received by the waiters?
>
> "Answer. Inasmuch as the employer bases the remuneration of his employee on the amount of such tips, and since the employees must inform the employer of the amount of tips received in order that the latter may compute the balance due the employees, it is clear that such tips constitute 'wages' within the meaning of Titles VIII and IX of the Act."

In the above answer it is clear that the bureau determined that guaranteed tips were remuneration for employment and were wages paid or payable **by the employer.** The facts presented by this question are identical with the facts presented in the case now under consideration, and the bureau's answer is equally correct when applied to the

question of whether tips are wages under the Wage and Hour Act.

In his comments on these provisions of the Social Security Act and the ruling thereon (Petitioner's brief, p. 77) Petitioner ignores the fact that the "wages" defined in Sections 811 and 907 as being "remuneration" are wages which, according to Sections 1004 and 1101, must be **paid by** or **payable by** the employer.

(c) Interpretations of National Labor Relations Act support Respondent's contention.

The National Labor Relations Board, in ordering the reinstatement of waiters discharged for union activity, has directed in proceedings under the National Labor Relations Act that back pay be calculated on the basis of previous average income, including tips. **In re Club Troika,** 2 N. L. R. B. 90 (1936); **In re Willard,** 2 N. L. R. B. 1094 (1937). The Board in these cases was proceeding under a section of the National Labor Relations Act which authorized the Board to order "reinstatement of employees with or without back pay." The Board, then, must have determined that tips were "pay"—pay from the employer.

3. "Pay" and "wages" should not be construed narrowly so as not to include the tips accounted for under a guarantee plan since such a construction would lead to absurd and unreasonable results.

It will be recalled that this Court, in the case of **United States v. American Trucking Ass'n., supra,** stated that if a literal interpretation of a statute produces absurd or even unreasonable results, at variance with the policy of the legislation, this Court "has followed that purpose rather than the literal words."

In reaching the conclusion that tips were wages, the court, in **Sloat v. Rochester Taxicab Company, supra,** pointed out that the complainant employee received the same amount of wages by retaining his tips as if he had turned these tips back to his employer, and the employer had then returned an equal amount of money to the employee in payment for his services. As the court quite simply analyzed the situation, "If the employee receives from the employer $12.00 and retains the $5.10 in tips, he is getting through or from the employer $17.10 a week; and if the employer paid the employee $17.10 a week, and the tips were turned over to the employer, the result to each would be the same."

Certainly this statement is entirely sound and equally applicable to the present facts, and it illustrates the manifest absurdity of the interpretation of the Act contended for by the Petitioner who admits* that the red caps have received the minimum compensation provided by the Act —chiefly through tips—but denies that the tips, received and accounted for, may be taken into account in determining whether there has been a compliance with Section 6. In other words the Petitioner's position is that the requirement of the Act is met only if the employer, regardless of every other fact, manually transfers in cash to the employee from its general fund 25 cents and 30 cents per hour, and by adopting this position Petitioner completely disregards income to the employee and only considers expense to the company. It is clear that this construction of

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* It might be noted that in his written opinion Judge Atwell stated (Transcript of Record p. 285): "Counsel have called the court's attention to the fact, as disclosed by the stipulation and testimony, that the red caps who are suing here have already received a little more than they were receiving before the law was passed."

the Act would result in the receipt by the red caps not only of tips which in many cases approach or equal the minimum wage provided by Section 6, and which have been accounted for justly and fairly, but also of additional amounts directly from the company equal in amount to the tips received. It is difficult to conceive of a more absurd and unreasonable result than for this particular class of Respondent's employees to be entitled under the Act to substantially more compensation than the minimum provided by the Act. Such a construction, in effect, means that the Act was not only designated to assure a minimum living standard of wages but also to impose upon certain employers, with respect to certain employees, an expense over and above that necessary to provide those employees with the minimum standard of living wages.

To refuse to give effect to the accounting and guarantee plan, as the trial court erroneously refused to do, would single out red caps, and other receivers of tips, as special beneficiaries of the Act. Manifestly Congress intended the Act to operate uniformly upon all employees subject to its regulations; any other intention would be unreasonable and inequitable. The uniform result intended was that each employee should receive and retain a minimum of 25 cents for each hour's work. That result was accomplished for the red caps by the accounting and guarantee plan. Consequently that plan did not violate the Act. It would be an arbitrary and unreasonable interpretation of the Act to hold that red caps are in a preferred class, entitled to a bonus, while other carrier employees shall be guaranteed only the minimum wage.

POINT V

There was no abandonment of the accounting and guarantee plan by Respondent during the period from March 1, 1939, to October 15, 1939, as claimed by Petitioner under his Point V.

Argument in Support of Point V

In one short paragraph on pages 64 and 65 of his brief, Petitioner somewhat casually asserts that Respondent abandoned the accounting and guarantee plan between March 1, 1939, and October 15, 1939; because it adopted new forms of reports for use by its employees during such period.

The stipulation signed by both parties hereto and filed of record in the trial court specifically provided (Tr. of R. 130-132):

> "It Is Agreed * * * That prior to March 1, 1939, defendant prepared and furnished to the red caps, 'Red Cap Time Slip' forms, one of said forms being attached hereto and marked Exhibit 'C'; that prior to March 1, 1939, defendant advised the red caps that defendant would assume unless reported to the contrary, that for each work period after February 28, 1939, each red cap collected in tips at least an amount equivalent to the number of hours worked multiplied by twenty-five cents (25 cents), and that should any red cap receive less than said amount during any work period **he should report it to defendant and defendant would pay to such red cap** an amount equal to the difference between the amount of tips collected and the amount represented by multiplying the number of hours worked by twenty-five cents (25¢). * * *
>
> "It is agreed that during the period from October 24, 1938, through October 23, 1939, that defendant stood ready to and did pay to each red cap, for each work period during which the amount of tips collected

> by said red cap amounted to less than the number of hours worked multiplied by twenty-five cents (25¢), an amount equal to the difference between the amount of tips collected and the number of hours worked multiplied by twenty-five cents (25¢);"

In the short statement devoted to this point in Petitioner's brief it is conceded that:

> "It is true that the Respondent stood ready to pay the red caps if they reported their tips had not equalled the minimum wage,"

Respondent is not charged with any failure to pay the difference between the tips which it permitted its employee to retain and the minimum wage. Indeed, it is specifically agreed and stipulated to the contrary. Petitioner argues that some additional rights accrue to the red caps because during a certain period they were required to report only the difference between the tips received and the minimum wage, and because Respondent accepted the accuracy of its employees' reports without requiring detailed information covering the tips received and retained. It is admitted that the amounts thus received and retained by permission and agreement with Respondent were equal to or greater than the minimum wage. Respondent submits that this half-hearted suggestion of Petitioner is entitled to no greater consideration by way of reply than Petitioner gave to it in making the argument.

POINT VI

Liquidated or punitive damages are not recoverable in the absence of a showing of fraud, malice, willful violation of the law, or gross negligence; and there being no such showing herein, no recovery of liquidated damages can be had.

Authorities in Support of Point VI

Scott v. Donald, 165 U. S. 58;
Tilghman v. Proctor, 125 U. S. 136;
Tinker v. Scharnhorst, 263 P. 645;
United States v. Joseph G. Chouteau, 102 U. S. 603.

Argument in Support of Point VI

Section 16(b) of the Fair Labor Standards Act provides:

> "Any employer who violates the provisions of Section 206 or Section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * *"

The trial court in its opinion obviously takes the position that if in any instance the full minimum wage is not paid to an employee the infliction of the penalty provided for under Section 16(b) of the Act is mandatory under the statute, and the following language of the trial court is significant: "The third question is somewhat more difficult. It is more difficult because the penalty of the statute makes the burden heavy on the erring employer."

There is no evidence in the present case to indicate either directly or by implication that Respondent either willfully,

fraudulently, or maliciously violated the Act. Even if violation is admitted purely for the sake of argument (and there is no admission of violation here), we submit that the mere fact that the Act was violated is not in and of itself sufficient ground upon which arbitrarily to impose the severe penalty provided for in Section 16(b). There is no distinction in law between the recovery of a penalty in a civil action or in a criminal prosecution. "Admitting that the penalty may be recovered in a civil action as well as by criminal prosecution, it is still punishment for the infraction of the law. This term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, either by a civil action or criminal prosecution." **United States v. Joseph G. Chouteau**, 102 U. S. 603, 26 L. Ed. 246. It is not disputed that Respondent made every effort to comply with the Act (and we submit has complied with it). The situation is not unlike one in which exemplary or punitive damages are allowed. In effect the civil penalty is identical with punitive damages. Where punitive or exemplary damages are allowed, malice or fraud (neither of which has been shown here) are necessary elements. "Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable • • • where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression. While some courts and text book writers have questioned the soundness of this doctrine, it has been accepted in England, in most of the states of this Union and has received the sanction of this court." **Scott v. Donald**, 165 U. S. 58, 41 L. Ed. 632. Again we find "Exemplary damages are imposed by the law upon the theory of

punishment of the offender for the general benefit of society and as a restraint to the transgressor and are allowed only in cases where malice, fraud, oppression or gross negligence enter into the cause of action." **Tinker v. Scharnhorst** (Oklahoma), 263 P. 645.

The mere violation of a statute in and of itself does not necessarily require the infliction of penalties. There is no proof in the record tending to establish any intentional, willful or malicious violation of the Act.

Other statutes contain provisions for liquidated damages, for example, the patent statute; and yet the courts have held uniformly that the penalty would only be inflicted where the circumstances require it. "* * * But the court may, whenever the circumstances of the case appear to require it, inflict vindicative or punitive damages by rendering judgment for not more than thrice the amount of the verdict." **Tilghman v. Proctor**, 125 U. S. 136, 31 L. Ed. 664, 666.

We submit that when, as here, an employer has taken every means to comply with the Act, the imposition of a penalty is unwarranted even if the court should ultimately find that the employer had misconstrued the statute.

CONCLUSION

Respondent submits that it had the legal right to exercise control and ownership over the "tips" which were the sole compensation paid by its patrons for services rendered by it through its red cap employees; that it exercised such right of control and ownership through its notice of October 22, 1938; that while an acceptance of such action was unnecessary, nevertheless the red caps who, on and after October 24, 1938, continued in the service of Respondent, handling hand baggage, receiving and reporting tips, receiving and retaining checks covering any deficiency, and otherwise complying with the terms of the notice of October 22nd, did accept such notice and are bound by the terms thereof; that no showing has been made of a violation by Respondent of the Railway Labor Act or the Interstate Commerce Act, and that such Acts provide their own remedies and do not affect Respondent's compliance with the Fair Labor Standards Act; and finally that Respondent has complied fully with both the purpose and the language of the Act, has paid the red caps their wages amounting to more than $38,626.99, and that Petitioner cannot recover such wages over again in this proceeding.

WHEREFORE, Respondent prays that the judgment of the Circuit Court be affirmed.

Respectfully submitted,

Robert G. Payne

Attorney for Respondent